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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-872

STATE OF LOUISIANA,
LOUISIANA MUNICIPAL ASSOCIATION
AND LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

REPLY OF STATE OF LOUISIANA AND ALLIED PETITIONERS TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THE HONORABLE EDWIN EDWARDS
Governor of the State of Louisiana
State Capitol Building
Baton Rouge, Louisiana

HONORABLE WILLIAM J. GUSTE, JR.
Attorney General for the State
of Louisiana
State Capitol Building
Baton Rouge, Louisiana

ARNOLD D. BERKELEY
Suite 504, 1735 Eye Street, N. W.
Washington, D. C. 20006
Attorney for Petitioners

April, 1974

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Opposing briefs demonstrate that the Federal Power Commission (FPC) is seeking to usurp the jurisdiction of the states to regulate local operations of intrastate gas pipelines. Such briefs ignore the basic and far-reaching issues worthy of review by this Court, fail to defend the rationale underlying the decision of the Court of Appeals and deal in detail, with the merits, of subsidiary issues. Instead, the opposing parties have presented new arguments to which this reply is addressed.

1. Louisiana[1] urges the granting of certiorari because the oppositions of the FPC and United Gas Pipe Line Company (United[2]) utterly fail to address, or rebut, its contention that the issues presented by this proceeding are of exceptional importance and first impression and that the decision below will aggravate the present nationwide shortage of all fossil fuels (LA 11-13, 22). Thus, they do not deny that affirmance of the decision below will prevent common use of gas supplies and facilities by interstate and intrastate lines, prohibit exchanges of gas between them and permit any intrastate line to unilaterally void, at will, its contractual obligations to producers and consumers. Surely, United's reference (UN 9, n. 16) to New York's earlier support of the FPC below is not responsive to our specific arguments and, in any event, that single state does not represent, as United mistakenly claims, the "eastern consumer interests." New York certainly does not represent the five producing states, the major independent producers or United's customers seeking certiorari here.

2. All parties agree that federal jurisdiction over the facilities and operation of natural gas pipelines depends upon a physical movement of gas across state lines (i.e. the "channel of constant flow test of *Lo-Vaca*[3] and *Amerada*[4]). Since no such flow occurs in Green East the FPC (p. 12) and United (p. 8) urge that the relevant channel is that

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[1]Referred to in citations to Petition for Certiorari as "LA."

[2]Referred to in citations to Brief Opposing Certiorari as "UN."

[3]*California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366.

[4]*Federal Power Commission* v. *Amerada Petroleum Co.* 379 U.S. 687.

of the lines in which "interstate" gas produced in Louisiana flows to other states before injection in the local Green East facilities. But, the Act defines FPC jurisdiction solely in terms of interstate sales and transportation,[5] and natural gas has neither an interstate nor intrastate character. Under the Act, the FPC has jurisdiction only over the sale or transportation at the point where interstate facilities deliver gas to local facilities, but under the nonstatutory concept of "interstate gas," the agency's jurisdiction would include *all* subsequent sales made either from the intrastate line which receives such gas or from any other intrastate line connected thereto at any single point. Thus, the FPC has fully confirmed our claim that state jurisdiction over intrastate pipelines serving only local consumers would be lost unless there is a complete isolation of each and every facility of such lines from any interconnections or exchanges with gas produced within the state of consumption which is commingled with other such local gas destined to other states (LA 17).

3. No party disputes Louisiana's assertion that continued intrastate status for the Green and Purple facilities will not adversely affect interstate consumers served by United (LA18-19). Thus, United's claim (12-13) that curtailment problems cannot be solved by the FPC controlling deliveries at the point of interconnection between its interstate and intrastate facilities concerns only the ability of the State of Louisiana to protect its own human needs gas consumers. But, service to such local consumers is admittedly[6] beyond FPC jurisdiction, under the Section 1(b) exemption of "local distribution of natural gas."

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[5]Section 1 (b). *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 516.

[6]*United Gas Pipe Line Co.*, 46 FPC 786, 807 (1971).

4. United assumes, contrary to fact, that if the Green and Purple facilities are Hinshawed human needs customers in Louisiana will suffer (UN 13). But, no party has either denied or rebutted our claim that the contractual provisions under which United curtailed its local customers long before the FPC assumed jurisdiction give the highest priority to residential and commercial consumers of gas (LA 18). In any event, they grossly misread the provisions of Louisiana's Constitution which provides:

> "*The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered* by the common carriers and public utilities . . .; provided, however, that the power and authority of the Commission shall not extend to any aspect of direct *sales* of natural gas . . .". (Emphasis added).

Thus, the Louisiana Commission has plenary regulatory authority over the *services* of an intrastate pipeline serving both resale and direct sale customers and has the same separate "transportation" and "sales" jurisdiction which this Court found to exist in sustaining the FPC's curtailment authority over direct sales, which were expressly excluded from the ambit of FPC jurisdiction by § 1(b) of the Act. *FPC* v. *Louisiana Power and Light Co.*, 406 U.S. 621, 641. Finally, the interpretation of this constitutional provision is the exclusive prerogative of the Louisiana Supreme Court.

This controversy has been mooted by the enactment of the Natural Resources and Energy Act of 1973 by the

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[7]Article VI, Section 4, as amended (1964).

Legislature of Louisiana[8]. That Act applies to intrastate pipelines or Hinshawed pipelines[9] and authorizes the Commissioner, upon the declaration of an emergency gas shortage by the Governor,[10] to order any such pipeline to curtail in accordance with priorities which give the highest priority to human needs[11] subject to certain limitations upon the volumes of gas thus reallocated[12] which do not apply to contracts executed after the Act.[13]

5. The FPC (16, n. 11) seeks to rewrite § 1 (c) which makes conclusive a certification from the state commission that it has "regulatory jurisdiction over rates and services"[14], by requiring that State jurisdiction over direct sales be coextensive with Federal jurisdiction. This will enable it to emasculate the effectiveness of the Congressional exemption of pipeline operations of local concern from Federal regulation.

6. The "another person" requirement does not bar a § 1 (c) exemption (FPC 13-15, UN 14) since neither United nor the FPC deny or rebut our arguments that Green-East and Green-West facilities must be separately considered, for

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[8] Louisiana Revised Statutes of 1950, Title 30, Chapter 7. Ten certified copies have been filed with the Clerk for distribution.

[9] § 503 (4), (5) and (6).

[10] § 571.

[11] §572 specifies a predetermined set of priorities to be implemented immediately which the Commissioner may alter by order under § 574 B.

[12] § 575.1 limits reductions on deliveries ordered by the Commissioner to 10% of maximum daily contract quantities or, in the case of gas purchased in the field by an ultimate consumer transporting through his own pipeline, to 25,000 Mcf per day.

[13] *Id.*

[14] Opinion 610 (Jt. App. 48a) acknowledged that the Louisiana Commission has made such a certification.

Hinshaw purposes, and that deliveries to the East facilities at the tailgate of extraction plants are made by independent producers, not by United (LA 6, 16, 20). The FPC misstates the facts of record in claiming (15-16) that the gas exchanged by the Purple facilities is received from United. For, as the Court of Appeals found (Jt. App. 25a-26a), the exchange at each point is with *another* interstate pipeline and at Point H (the only other point where interstate gas flows) gas is delivered by *independent producers*.

7. The FPC's theory (16) that the Purple facilities are not eligible under § 1 (c) because gas is exchanged with interstate lines is inconsistent with its action in certificating such an exchange in *Michigan Consolidated Gas Co., et al.*, 46 FPC 658, while preserving the exempt status of the local line. And, contrary to the FPC's claim (Id), the Court made *no* findings on the eligibility of the Purple facilities for a § 1 (c) exemption since its recital of out-of-state gas flows was made in finding FPC jurisdiction over such facilities (Jt. App. 25a), which Louisiana concedes.

8. The FPC's argument (15-16) that the Green East and Purple facilities fail to meet the § 1 (c) requirement that all gas received from another person be consumed within the State imposes a test which is impossible to meet. It contends that since only a part of the commingled interstate and intrastate gas stream is injected into, and consumed within, the local facilities, the remainder is consumed outside Louisiana. But this is true of every interstate line serving more that one state and a line serving only a single state is *intrastate* and does not require the exemption.

CONCLUSION

Louisiana's petition for writ of certiorari should be granted.

Respectfully submitted,

STATE OF LOUISIANA,
LOUISIANA
MUNICIPAL ASSOCIATION AND
LOUISIANA PUBLIC SERVICE
COMMISSION

THE HONORABLE EDWIN
EDWARDS
Governor of the State of
Louisiana
State Capitol Building
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HONORABLE WILLIAM J.
GUSTE, JR.
Attorney General of the State
of Louisiana
State Capitol Building
Baton Rouge, Louisiana

ARNOLD D. BERKELEY
Suite 504, 1735 Eye Street,
N.W.
Washington, D.C. 20006
(202) 785-0611
Their Attorney

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